MALAYSIAN BAR & ANOR. v. GOVERNMENT OF MALAYSIA

[O.C.J. (Harun J.) June 13, 1985 & January 22, 1986]

[Kuala Lumpur – Originating Summons No. A 45 of 1985]

Legal Profession – Disqualification for membership of Bar Council or Bar Committee or any committee thereof – Whether ultra vires the Federal Constitution – Equality before the law – Freedom of association – Legal Profession Act, 1976, s. 46A – Federal Constitution, arts. 4(1) & 10(1)(c)

Constitutional Law – Disqualification for membership of Bar Council or Bar Committee or any committee thereof – Whether ultra vires the Federal Constitution – Equality before the law – Freedom of association – Legal Profession Act, 1976, s. 46A – Federal Constitution art. 4(1)

In this originating summons the plaintiffs sought the following declarations –

a) that section 46(1)(a) of the Legal Profession Act, 1976 as introduced by the Legal Profession (Amendment) Act, 1978, is *ultra vires* Article (1) of the Federal Constitution guaranteeing equality before the law and equal protection of the law and therefore void under Article 4(1) of the Federal Constitution.

b) that section 46A(1)(a) of the Legal Profession Act, 1976 as introduced by the Legal Profession (Amendment) Act, 1978 is *ultra vires* Article 10(1)(c) of the Federal Constitution guaranteeing freedom of association and therefore void under Article 4(1) of the Federal Constitution.

Held: (1) it is common ground that a law is bad if it is discriminating, unreasonable and if there is no nexus between the law and the objects of the amending act;

(2) one of the objects of section 46A of the Legal Profession Act, 1976, is clearly that the affairs of the Bar be managed by members of the Legal Profession who are not only professionally independent but appear to the outside world to be so. Hence the provision that lawyers who are members of Parliament or any of the State Legislatures or local authorities or hold office in any trade union or political party or organizations of a political nature are disqualified from holding office in the Bar Council or Committees. The provisions (section 46A(1)(b) and (c)) apply to all lawyers and are therefore not discriminatory;

(3) it also seems to be the object of section 46A of the Legal Profession Act, 1976, to ensure that the management of the Bar is in the hands of senior members of the profession. The powers and functions of the Bar Council and State Bar Committees as provided by the Act must clearly be exercised by senior members of the profession and the disqualification from membership of these bodies by junior members is not unreasonable;

(4) in so far however as section 46A(1) applies to any Committee of the Bar Council or a Bar Committee the provision has gone more than a little too far and is unreasonable. The words "or of any committee of the Bar Council or a Bar Committee" appearing in the section in so far as it affects paragraph (a) thereof is *ultra vires* Article 8(1) and is therefore void under Article 4(1) of the Federal Constitution but the remaining provisions are not *ultra vires* or void under the Federal Constitution;

(5) nowhere in section 46A is there a provision to prevent a lawyer from being a member of the Bar. The question of freedom of association therefore does not arise. Section 46A(1)(a) of the Legal Profession Act, 1976, is not *ultra vires* Article 10(1)(c) and therefore not void under Article 4(1) of the Federal Constitution.

Cases referred to

(1) *Datuk Haji Harun bin Haji Idris* v. *Public Prosecutor* [1977] 2 M.L.J. 155, 165.

(2) *Public Prosecutor* v. *Khong Teng Khen & Anor.* [1976] 2 M.L.J. 166, 170.

(3) *Azeez Basha* v. *Union of India* AIR 1968 S.C. 662, 675.

ORIGINATING SUMMONS.

Ronald Khoo (*C.V. Das* with him) for the plaintiffs.

Tan Sri Abu Talib bin Osman, Attorney-General (*Lim Beng Choon*, Senior Federal Counsel with him) for the defendant.

Cur. Adv. Vult.

Harun J.: In these proceedings, the plaintiffs seek the following declarations –

(a) that section 46A(1)(a) of the Legal Profession Act, 1976 (Act 166 of 1976) as introduced by the Legal Profession (Amendment) Act, 1978 (A419 of 1978) is *ultra vires* Article 8(1) of the Federal Constitution guaranteeing equality before the law and equal protection of the law and therefore void under Article 4(1) of the Federal Constitution.

(b) that section 46A(1)(a) of the Legal Profession Act, 1976 (Act 166 of 1976) as introduced by the Legal Profession (Amendment) Act, 1978 (Act A419 of 1978) is *ultra vires* Article 10(1)(c) of the Federal Constitution guaranteeing freedom of association and therefore void under Article 4(1) of the Federal Constitution.

Section 46A of the Legal Profession Act (the Act) provides –

"(1) A person shall be disqualified for being a member of the Bar Council or a Bar Committee, or of any committee of the Bar Council or a Bar Committee –

(a) unless he is and has been an advocate and solicitor for a period of not less than seven years, or for periods which in the aggregate amount to not less than seven years; or

(b) if he is a member of either House of Parliament, or of a State Legislative Assembly, or of any local authority; or

(c) if he holds any office in –

(i) any trade union; or

(ii) any political party; or

(iii) any other organisation, body or group of persons whatsoever, whether or not it is established under any law, whether it is in Malaysia or outside Malaysia, which has objectives or carries on activities which can be construed as being political in nature, character or effect, or which is declared by the Attorney General by order published in the Gazette, to be an organisation, body or group of persons which has such objectives or carries on such activities.

(2) An order made by the Attorney General under paragraph (c)(iii) of subsection (1) shall not be reviewed or called in question in any court.

(3) Where a member of the Bar Council or a Bar Committee, or of any committee of the Bar Council or a Bar Committee, becomes disqualified under subsection (1), he shall immediately thereupon be deemed to have vacated his membership thereof and any office that he may hold therein."

The section came into effect on January 24, 1978. The Act itself came into force on June 1, 1977 repealing and replacing the Advocates & Solicitors Ordinance, 1947 (the Ordinance). Neither in the Act (before this amendment) nor in the Ordinance was there a provision for disqualification for membership of the aforesaid bodies. In particular, prior to the amendment, advocates & solicitors (lawyers) with less than 7 years standing were eligible and did hold office in the Bar Council, State Bar Committees and in 17 Standing Committees and other ad hoc committees appointed under section 58 of the Act. Out of 31 members of the Bar Council, the number of lawyers with less than 7 years standing (junior lawyers) who were elected to the Council prior to the amendment was –

1975 – 7
1976 – 3
1977 – 6
1978 – 1

As at end of February 1985, there were 1760 practising lawyers and of these, 790 (44.8%) are junior lawyers. The number of new lawyers entering the profession is increasing each year as the following number of Petitions for Admission shows –

1980 – 107
1981 – 112
1982 – 180
1983 – 275
1984 – 313

Ever since the amendment came into force, the Bar Council has ceaselessly persuaded the Government to remove the restriction on junior lawyers holding office in the Bar Council and Committees but without any success. It is said that there is an insufficient number of senior lawyers who have the time to carry out all the duties required of the Bar Council and Committees under the Act. Able and willing junior lawyers are prevented from actively participating in committee work. In any event nearly half the lawyers are not represented in any of the Committees. The Government's answer is that the reason for the amendment is to ensure that only experienced and responsible members of the Bar should be members of the Bar Council and Committees to manage the affairs of the Bar and exercise the powers of the several bodies under the Act. Having exhausted their efforts and patience, the Plaintiffs now contend that the amendment (section 46A (1)(a) of the Act) is *ultra vires* the Federal Constitution.

It is argued that the effect of the amendment is to divide lawyers into *classes* of junior and senior members of the Bar although –

Under section 35(1) all lawyers have the exclusive right to appear and plead in all Courts of Justice, and as between themselves shall have the same rights and privileges without differentiation;

Under section 43 all lawyers are automatically members of the Malaysian Bar;

Under section 44 all lawyers are eligible to–

(a) attend and vote at any general meeting;

(b) vote on the election of members to the Bar Council,

provided they are not in arrears of the subscriptions.

Under section 46 all lawyers at present pay the same rate of subscriptions and levies. The only exceptions made are –

Under section 13, masters must be of 7 years, standing – this is understandable because only experienced lawyers can instruct pupils; and

Under section 99, only lawyers of 7 years standing may be appointed members of the Disciplinary Committee – again this is understandable to avoid junior members of the Bar sitting in judgment of their seniors; and experience is required to deal with ethics of the profession. In any event both exceptions were present in the Ordinance. It is therefore submitted that the classification is *discriminatory* under Article 8(1) of the Federal Constitution which provides –

"All persons are equal before the law and entitled to equal protection of the law."

It is common ground that a law is bad if it is discriminatory, unreasonable and if there is no nexus between the law and objects of the amending Act. The principles of classification and constitutionality under Article 8 of the Federal Constitution have been exhaustively dealt with by the Federal Court in *Datuk Haji Harun bin Haji Idris* v. *Public Prosecutor*[1] where Suffian L.P. (in delivering the judgment of the Court) at page 165 said:

"the first question we should ask is, is the law discriminatory and that the answer should then be – if the law is not discriminatory, if for instance it obviously applies to everybody, it is good law, but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either expressly allowed by the constitution or is allowed by judicial interpretation we have to ask the further question, is it allowed? If it is, the law is good, and if it is not, the law is void."

"The principle underlying Article 8 is that a law must operate alike on all persons *under like circumstances* not simply that it must operate alike on all persons in any circumstances, nor that it must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons ... for the purpose of legislation" per Suffian L.P. in *Public Prosecutor* v. *Khong Teng Khen & Anor.*[2] Applying the above principle, is section 46A discriminatory?

In the first place, I think, section 46A read as whole is a provision prescribing the disqualification for membership of the Bar Council and Committees. The object is clearly that the affairs of the Bar be managed by members of the legal profession who are not only professionally independent but appear to the outside world to be so. The emphasis is an independent Bar which is not subject to external influences of a non-professional character. Hence the provision that lawyers who are members of Parliament, or any of the State Legislatures or local authorities; or hold office in any trade unions or political party or organisations of a political nature are disqualified from holding office in the Bar Council or Committees. These provisions (subsection 46A (1)(b) & (c)) apply to all lawyers and are therefore, not discriminatory.

In the second place, it seems to me that the object is to ensure that the management of the Bar is in the hands of the senior members of the profession. This provision is consistent with other provisions of the Act (sections 13 & 99) also requiring 7 years' standing. The provision for senior members of a profession to oversee other members is not unknown to the law see *e.g.* the Architects Act 1967, where only architects with not less than three years in private practice can be appointed to the Board of Architects: section 3(1)(d). Imposing disqualifications on the same body of men does not make the law discriminatory. As a consequence of the disqualification, lawyers can be said to be divided into classes of senior lawyers and junior lawyers. But is such a classification in the circumstances of this case unreasonable? I think it is quite clear that the only object of the legislation (as can be discerned from the provision itself) is that senior lawyers should oversee the affairs of the profession. In practice, the management of the affairs of the Bar is organised on a three-tier structure as follows –

(a) The Bar Council (section 47) with powers over the entire Bar (sections 56 & 57);

(b) State Bar Committees with powers over members of the Bar within the State only (section 73);

(c) Committees appointed by the Bar Council under section 58 (there are 17 such Committees) with functions ranging from legislation to sports and welfare.

In my opinion the powers and functions of the Bar Council and State Bar Committees as provided by the Act must clearly be exercised by senior members of the profession and the disqualification from membership of these bodies by junior lawyers is not unreasonable. Section 46A(1), however also applies to "any committee of the Bar Council or a Bar Committee". In my view this part of the provision has gone more than somewhat a little too far and is unreasonable for the following reasons –

(a) There is adequate protection against usurpation or abuse of powers by a Committee under subsection 4 of section 58 which reads –

"The Bar Council shall not delegate to a Committee appointed under this section any of its functions unless at least two thirds of the members of the Committee (including the Chairman thereof) are members of the Council.";

(b) The Committees generally do the ground-work and make recommendations to the Bar Council or State Bar Committee for adoption and implementation;

(c) It is unreasonable to expect senior members of the Bar to take an active part in, say, the Sports Committee;

(d) The number of lawyers required to serve in these Committees is very large and imposes a severe strain on senior lawyers.

It does not follow that the entire provision of section 46A(1) is bad. Applying the doctrine of severability, the bad can be severed from the good.

I accordingly hold that the words "or of any committee of the Bar Council or a Bar Committee" appearing in section 46A(1) of the Legal Profession Act in so far as it affects paragraph (a) thereof is *ultra vires* Article 8(1) and is therefore void under Article 4(1) of the Federal Constitution but the remaining provisions are not *ultra vires* or void under the Federal Constitution.

As regards the second declaration sought I find no merit in the argument that the amendment is in violation of Article 10(1)(c) of the Federal Constitution in that it violates the rights of citizens to form associations. First only lawyers can become members of the Malaysian Bar. Secondly, every lawyer is automatically a member of the Bar (section 43 of the Act). He continues membership so long as he holds a valid practising certificate. Nowhere in section 46A is there a provision to prevent a lawyer from being a member of the Bar. The question of freedom of association therefore does not arise.

It is contended that the amendment has brought a change in the composition of the Bar Council and therefore the right of association has been violated. There is no merit in this argument either because Article 10(1)(c) does not give any right to any citizen to manage any association but merely the right to form associations: *Azeez Basha* v. *Union of India.*[3] I accordingly find that section 46A (1)(a) is not *ultra vires* Article 10(1)(c) and therefore not void under Article 4(1) of the Federal Constitution.

There will be no order as to costs.

Order accordingly.

Solicitors: *Shook Lin & Bok.*

IN RE SUSIE TEOH; TEOH ENG HUAT v. KADHI OF PASIR MAS KELANTAN & MAJLIS UGAMA ISLAM DAN ADAT ISTIADAT MELAYU, KELANTAN

[O.C.J. (Abdul Malek J.) April 21 & May 18, 1986]
[Kota Bharu – Originating Summons No. 31-35 of 1986]

Constitutional Law – Freedom of religion – Right of girl of 17 years old to choose her religion – Whether father has right to choose her religion – Rights in respect of education – Power of parent or guardian to decide on religious education of person under 18 years of age – Kelantan Council of Religion and Malay Custom Enactment, 1966, s.57 – Federal Constitution, arts. 11(1) & 12(4).

Family Law – Guardianship of infants – Whether Guardianship of Infants Act 1961 applies to Muslims in Kelantan – Right of guardianship of father – Islamic Family Law Enactment, Kelantan, s.92 – Guardianship of Infants Act, 1961, s.1.

In this case the plaintiff learnt that his daugther aged 17 years had been converted to Islam. This was without his knowledge and consent. He applied to the High Court for the following declarations and orders:

a) a declaration that he, as the lawful father and guardian of the infant, has the right to decide her religion, education and upbringing;

b) a declaration that the infant shall continue to be brought up in the Buddhist faith in accordance with his wishes;

c) a declaration that the infant's conversion into the Muslim faith made some time between December 18 and 22, 1985 by its 1st defendant, without his consent, is null and void;

d) an order that the registration of the conversion of the infant into the Muslim faith in the records of the 2nd defendant be expunged;

e) costs; and

f) such further or other order as the Honourable Court deemed fit and proper.

Held: (1) the girl in this case had the right to choose her own religion, if she does it on her own free will in view of Articles 11 and 12 of the Federal Constitution;

(2) the application in the first prayer as regards the right of the plaintiff to decide the infant's religion should therefore be dismissed;